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Supreme Court, U.S.
FILED
NOV 10 1958
Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 484

GRADY COUNTY, GEORGIA,
Petitioner,

vs.

IMOGENE WRIGHT DICKERSON,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 257 F. 2d 369.

QUESTIONS PRESENTED

The second question presented by Petitioner is restated as follows:

Where a suit is filed against a county of the State of Georgia under the provisions of Section 95-1001, Georgia Code Annotated (Appendix to Petition, p. 21), is the suit converted into a suit against the State of Georgia when the county vouches the State Highway Department under the provisions of Section 95-1710 (Appendix to Petition, p. 23)?

ARGUMENT

I. The Decision of the Court of Appeals is Correct

It has been established law for many years that the immunity of the state under the Eleventh Amendment does not extend to cities and counties and that such political subdivisions are citizens of the state in which they are organized for the purpose of determining federal jurisdiction in diversity cases.

Lincoln County v. Luning, 133 U. S. 529, 10 S. Ct. 363, 33 L. Ed. 766.

Mercer County v. Cowles, 74 U. S. (7 Wall.) 118, 19 L. Ed. 86.

Chicot County v. Sherwood, 148 U. S. 529, 13 S. Ct. 695, 37 L. Ed. 546.

Port of Seattle v. Oregon & W. RR., 255 U. S. 56, 41 S. Ct. 237, 65 L. Ed. 500.

There is no foundation for Petitioner's contention that Georgia counties should be exempt from this rule.

A county of the State of Georgia is a body corporate with power to sue or be sued in any court.

> Article XI, Sec. I, Par. I, Constitution of the State of Georgia (Appendix to Petition, p. 20).
>
> Section 23-1501, Georgia Code Annotated ("Every county is a body corporate, with power to sue or be sued in any court").

It is true that a Georgia county "is not liable to suit for any cause of action unless made so by statute."

> Section 23-1502, Georgia Code Annotated (Appendix to Petition, p. 21).

But a Georgia statute has made a county liable to suit for injuries caused by a defective bridge.

> Section 95-1001, Georgia Code Annotated (Appendix to Petition, p. 21).

Petitioner contends that federal jurisdiction fails because this case was converted into a suit against the State of Georgia when petitioner vouched the State Highway Department under Section 95-1710 (Appendix of Petition, p. 23). This argument collides head-on with a full-bench, unanimous decision of the Supreme Court of Georgia.

> *Schwarcz v. Charlton County*, 211 Ga. 923, 89 S. E. 2d 881.

In the *Schwarcz* case, the plaintiff filed a suit in the Superior Court of Glynn County against Seaboard Construction Company, a corporation with its principal office in Glynn County, and against Charlton

County as joint tort-feasors. Plaintiff alleged that Charlton County was negligent in maintaining a defective bridge and that Seaboard was negligent in failing to maintain signs or other devices warning motorists of the defective bridge. Charlton County vouched the State Highway Department under Code Section 95-1710. Charlton County jointly with State Highway Department as vouchee filed a plea to the jurisdiction on the ground that a Georgia statute required all suits against the State Highway Department to be brought in the county where the cause of action arose. Plaintiff moved to strike this plea to the jurisdiction. The trial court overruled this motion and sustained the plea. The Supreme Court reversed the trial court. At Page 927 of the decision, the court said:

> "After the State Highway Department was served with notice of the pendency of the suit against the county, when it came into court to defend the suit it had the right, in the name of the county, to file any and all defensive pleadings to the suit that the county would have had the right to file. Not being subject to being made a party to the suit, it can not defend the action in its own name and raise issues which the county could not raise. If at the time of filing of the suit the court had jurisdiction over the county as a party defendant, such jurisdiction was not ousted by the filing of a plea to the jurisdiction by the State Highway Department or the county, on the ground that the court had no jurisdiction

over it. Jurisdiction is determined as to those who are the real or actual parties to the suit, and not by one who is not a party though he may be bound ultimately to respond to the judgment rendered in the proceeding."

Assuming but not conceding that Petitioner is correct in saying that the word "venue" should be substituted for the word "jurisdiction" in the *Schwarcz* case, the reasoning upon which that decision is based is equally sound and applicable whether applied to an issue of venue or jurisdiction.

This ruling by the Supreme Court of Georgia in the *Schwarcz* case upon an issue properly presented for decision was not obiter dicta, even though the court disposed of the case on another point.

Florida Central Railroad Company v. Shutte, 103 U. S. 118, 143, 26 L. Ed. 327.

Dooly v. Gates, 194 Ga. 787, 793, 22 S. E. 2d 837.

This construction of a state statute by the Supreme Court of Georgia is conclusive upon the federal courts.

Greenough v. Tax Assessors, 331 U. S. 486, 67 S. Ct. 1400, 91 L. Ed. 1621, 172 A. L. R. 329.

Morehead v. New York ex rel. Tipaldo, 298 U. S. 587, 56 S. Ct. 918, 80 L. Ed. 1347, 103 A. L. R. 1445.

Great Northern R. Co. v. Sunburst Oil & Ref. Co., 287 U. S. 358, 53 S. Ct. 145, 77 L. Ed. 360, 85 A. L. R. 254.

II. The Decision of the Court of Appeals Is not in Conflict with the Decision of Another Court of Appeals on the Same Matter.

Petitioner contends that the decision of the court of appeals is in conflict with the decisions of other courts of appeals. An examination of the cases cited in the petition will expose the error of this contention. For one thing, the cases cited do not involve counties or cities.

Furthermore, the decisions of the Courts of Appeals for the eighth, ninth and tenth circuits are in accord with this decision.

Board of Commissioners v. U. S., 10 Cir., 100 F. 2d 929.

City of Long Beach v. Metcalf, 9 Cir., 103 F. 2d 483, 485, cert. den. 308 U. S. 602, 60 S. Ct. 139, 84 L. Ed. 504.

Pettibone v. Cook County, Minnesota, 8 Cir., 120 F. 2d 850.

III. No Other Reason Exists for Granting Certiorari

The Court of Appeals has not decided an important state question in a way in conflict with applicable state law. To the contrary, the decision of the Court of Appeals is in accord with the decision of the Supreme Court of Georgia in the *Schwarcz* case, supra.

The Court of Appeals has not decided an important question of federal law which has not been, but should be, settled by this Court. Neither has the Court of

Appeals decided a federal question in a way in conflict with applicable decisions of this court. As indicated in division I of this argument, the decision of the Court of Appeals is in accord with the decisions of this Court.

Obviously, the Court of Appeals has not so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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